Richland Trade & Development Sdn Bhd & Ors v United Malayan Banking Corp Bhd

HIGH COURT (PENANG) — CIVIL SUIT NO 22–341–93
VINCENT NG J
19 OCTOBER 1995

Bankruptcy *— Capacity of bankrupt — Plaintiff made bankrupt after serving summons on defendant — Whether plaintiff has to withdraw action or need only to obtain the sanction of the Official Assignee — Whether word 'maintain' in s 38(1) Bankruptcy Act 1967 means that bankrupt cannot keep alive any action without previous sanction of Official Assignee — Bankruptcy Act 1967 s 38(1)*

Civil Procedure *— Pleadings — Application to strike out writ and statement of claim — Whether plaintiffs' statement of claim disclosed a prima facie case and reasonable cause of action*

Civil Procedure *— Estoppel — Res judicata — Whether allegations already raised in previous suit — Whether there was cause of action estoppel — Whether there was issue estoppel — Whether res judicata giving rise to estoppel arose*

The first plaintiff had purchased a flat unit through a financing loan from the defendant bank. The second and third plaintiffs were guarantors for the financing loan. Upon default of the first plaintiff in instalment payment, the defendant issued a demand notice and commenced two legal actions to recover the sum owed. Upon obtaining judgment, recovery proceedings were filed and six auction attempts were made but were abortive. The plaintiffs filed the current suit against the defendant on 15 September 1993 alleging that despite the fact that the auctions were abortive, the defendant had by its failure to respond and negligent misrepresentations to prospective purchasers secured by the plaintiffs, precluded the first plaintiff from disposing of the flat unit by private sale to repay the loan. The defendant had also refused to respond categorically to several requests from the plaintiffs and prospective purchasers for information on the outstanding amount then due on the loan. On 24 February 1994, the defendant made an application to strike out the second plaintiff on the ground that she had been declared a bankrupt on 17 October 1993 ('encl 13'). Later the defendant applied under O 18 r 19 of the Rules of the High Court 1980 ('encl 37') to strike out the writ and indorsement of claim on two grounds, which were: (i) that the statement of claim did not disclose a reasonable cause of action; and (ii) that the second plaintiff was caught by estoppel and res judicata as she had raised some of the allegations in the statement of claim in Civil Suit No 22(23)–238–88 ('the other suit').

Held, dismissing the defendant's applications:

(1) In view of the fact that the second plaintiff was made bankrupt only after the service of the summons on the defendant, there was no necessity for her to withdraw the action, but only to

obtain the sanction of the Official Assignee, which she subsequently secured on 22 April 1994. However, had the second plaintiff taken any further step or action in the proceedings against the defendant pending the said sanction, such step could be nullified. The word 'maintain' in s 38(1) of the Bankruptcy Act 1967 does not mean that a bankrupt cannot keep alive any action without the previous sanction of the Official Assignee as such interpretation would work injustice on the bankrupt to require him or her to withdraw the action and file afresh upon obtaining sanction. As the Official Assignee had confirmed that the second plaintiff had complied with the terms specified when the sanction was given, the defendant's application in encl 13 was devoid of any merit and ought to be dismissed (see p 242C–E).

(2) In considering whether the plaintiffs had a reasonable cause of action, the court must decide whether the defendant was justified in keeping the plaintiffs and potential purchasers on a perpetual guessing game to determine the actual amount due to the defendant at the material time. It is settled law that when an order for sale is made, the chargor does not abrogate all his rights to the chargee; until a bid is accepted, the chargor still retains the right to tender payment of the amount due to the chargee and to call off the sale. Further, it is the duty of a creditor, where he has security available for the payment and satisfaction of the debt, to do whatever is necessary to make that security properly available. Therefore, the plaintiffs' statement of claim discloses a prima facie case and reasonable cause of action against the defendant and it would not justify the striking out of their claim at this stage summarily (see p 245C–H; *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 and *Wulff v Jay* (1872) LR 7 QB 756 followed).

(3) In the interest of justice, the various estoppel principles have to be viewed through the looking-glass cardinal principle that no party should be readily driven from the judgment seat, though the onus is on he who sues to show the court that he has a prima facie cause of action upon the optimum evaluation test. Here, the plaintiffs have successfully discharged the onus upon the optimum evaluation test (see pp 248I, 249A–B; *Suppuletchimi a/p Karpaya v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368 followed; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 distinguished).

(4) As the cause of the action in the present suit and that in the other suit were different, there was no 'cause estoppel' and as the issues were also different there was no 'issue estoppel'. Further, even though issue estoppel and res judicata were pleaded in the defence against the second and third plaintiffs, the question of tortious misrepresentation was not even raised or decided in the other suit and the defendant did not produce any court records thereof. Thus, res judicata giving rise to an estoppel did not

arise. Even if the various pleas on estoppel and res judicata could validly be raised, in the present circumstances, as justice prescribes that the res judicata or estoppel principles should not be applied on a party who has suffered from the alleged conduct of another, the plaintiffs should not be prevented or shut out from re-opening the issue when it later arose in these proceedings (see p 249E–H; *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1967] 1 AC 853 and *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 followed).

[Bahasa Malaysia summary

Plaintif pertama telah membeli satu unit flat melalui pinjaman kewangan dari bank defendan. Plaintif kedua dan ketiga adalah penggerenti pinjaman kewangan itu. Apabila plaintif pertama gagal membuat bayaran ansuran, defendan telah mengeluarkan notis tuntutan dan memulakan dua tindakan undang-undang untuk mendapatkan balik jumlah yang dihutang itu. Setelah mendapat penghakiman, prosiding mendapat kembali telah difailkan dan enam percubaan untuk melelong telah dibuat tetapi telah gagal. Plaintif memfailkan guaman ini terhadap defendan pada 15 September 1993 dengan mengatakan bahawa walaupun lelongan itu telah gagal, defendan akibat kegagalannya untuk menjawab dan salah nyata yang cuai kepada pembeli prospektif yang dicarikan oleh plaintif, telah menghalang plaintif pertama dari menjual flat itu melalui jualan peribadi untuk membayar pinjaman itu. Defendan juga gagal menjawab secara mutlak beberapa pertanyaan daripada plaintif dan pembeli prospektif untuk maklumat berkaitan dengan hutang yang belum dijelaskan ke atas pinjaman itu. Pada 24 Februari 1994, defendan membuat satu permohonan untuk membatalkan plaintif kedua atas alasan bahawa dia telah diisytiharkan seorang bankrap pada 17 Oktober 1993 ('kand 13'). Selepas itu defendan memohon di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('kand 37') untuk membatalkan writ dan pengindorsan tuntutan atas dua alasan, iaitu: (i) bahawa pernyataan tuntutan itu tidak memperlihatkan kausa tindakan yang munasabah; dan (ii) bahawa plaintif kedua ditahan oleh estopel dan res judicata kerana dia telah membangkitkan beberapa pengataan dalam pernyataan tuntutan di dalam Guaman Sivil No 22(23)–238—88 ('guaman yang lagi satu').

Diputuskan, menolak permohonan-permohonan defendan:

(1) Memandangkan fakta bahawa plaintif kedua telah dijadikan seorang bankrap hanya selepas penyampaian saman ke atas defendan, tiada keperluan untuknya menarik balik tindakan itu, tetapi beliau hanya perlu mendapatkan kebenaran Pegawai Pemegang Harta, yang telahpun didapati pada 22 April 1994. Walau bagaimanapun, jika plaintif kedua mengambil langkah atau tindakan lanjut dalam prosiding terhadap defendan sebelum mendapatkan kebenaran itu, langkah sedemikian boleh dibatalkan. Perkataan 'maintain' dalam s 38(1) Akta Kebankrapan 1967

tidak bermaksud bahawa seseorang bankrap tidak boleh mengekalkan sebarang tindakan tanpa kebenaran terdahulu dari Pegawai Pemegang Harta kerana tafsiran sebegini akan menyebabkan ketidakadilan ke atas si bankrap dalam mengkehendakinya menarik balik dan memfailkan samannya semula setelah memperolehi kebenaran. Oleh kerana Pegawai Pemegang Harta telah mengesahkan bahawa plaintif kedua telah mematuhi syarat-syarat yang dinyatakan semasa kebenaran itu diberikan, permohonan defendan dalam kand 13 tidak mempunyai merit dan patut ditolak (lihat ms 242C–E).

(2) Dalam mempertimbangkan sama ada plaintif mempunyai satu kausa tindakan yang munasabah, mahkamah mesti membuat keputusan sama ada defendan berjustifikasi ketika membiarkan plaintif dan bakal pembeli dalam satu permainan meneka yang berpanjangan untuk menentukan jumlah sebenar yang masih terhutang kepada defendan pada masa yang berkenaan. Ia adalah undang-undang tetap bahawa apabila sesuatu perintah jualan dibuat, penggadai tidak melepaskan segala haknya kepada pemegang gadaian; sehingga satu tawaran diterima, penggadai masih mengekalkan haknya untuk membayar jumlah yang masih terhutang kepada pemegang gadaian dan membatalkan jualan tersebut. Lagipun, si piutang mesti, di mana beliau memegang sekuriti yang boleh dijual untuk membayar dan menyelesaikan hutang itu, membuat apa-apa yang perlu untuk menyediakan sekuriti itu. Maka, pernyataan tuntutan plaintif menunjukkan kes prima facie dan kausa tindakan yang munasabah terhadap defendan dan ini tidak menjustifikasikan pembatalan tuntutan pada peringkat ini secara terus (lihat ms 245C–H; *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 dan *Wulff v Jay* (1872) LR 7 QB 756 diikut).

(3) Demi kepentingan keadilan, prinsip estopel yang pelbagai mesti dilihat melalui prinsip utama bahawa tiada pihak yang patut dipaksa meninggalkan tempat penghakiman, walaupun tanggungjawab terletak pada orang yang membuat guaman untuk menunjukkan mahkamah bahawa dia mempunyai kausa tindakan prima facie di atas ujian penilaian optima. Di sini, plaintif telah berjaya menjelaskan tanggungjawabnya di atas ujian penilaian optima (lihat ms 248I, 249A–B; *Supputetchimi a/p Karpaya v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368 diikut; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 dibeza).

(4) Oleh kerana kausa tindakan dalam guaman ini dan kausa tindakan dalam guaman yang satu lagi adalah berlainan, tidak terdapat 'estopel kausa' dan oleh kerana isu-isu juga berlainan tidak terdapat 'estopel isu'. Tambahan lagi, biarpun estopel isu dan res judicata dijadikan pliding dalam pembelaan terhadap plaintif kedua dan ketiga, persoalan salah nyata tort tidak dibangkitkan atau diputuskan di dalam guaman yang satu lagi dan defendan tidak mengemukakan sebarang rekod mahkamah mengenainya

sebagai bukti. Maka, res judicata yang membawa kepada estopel tidak timbul. Sekalipun pelbagai rayuan mengenai estopel dan res judicata boleh dibangkitkan dengan sah, dalam keadaan kes ini, oleh kerana keadilan memperuntukkan bahawa prinsip-prinsip res judicata atau estopel tidak patut dipakai terhadap satu pihak yang terjejas akibat kelakuan pihak yang satu lagi yang dikatakan itu, plaintif tidak patut disekat atau dihalang dari membuka semula isu itu apabila ia kemudiannya timbul dalam prosiding ini (lihat ms 249E–H; *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1967] 1 AC 853 dan *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 diikut).]

[*Editorial note*: The defendant has appealed to the Court of Appeal vide Civil Appeal No P–02–636–95.]

Notes

For cases on capacity of a bankrupt, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1277–1283.

For cases on striking out writ and statement of claim in pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2754–2765.

For cases on estoppel and res judicata, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1225–1238.

Cases referred to

Allnutt v Mills (1925) 42 TLR 68
'Annie Johnson', The (1921) 91 LJP 64
Bynoe v Bank of England [1902] 1 KB 467
Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2) [1967] 1 AC 853
Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3) [1970] 1 Ch 506
Debtor (No 472 of 1950), Re [1958] 1 All ER 581
Duchess of Kingston (1976) 20 St Tr 355
Dyson v A-G [1911] 1 KB 410
Fidelitas Shipping Co Ltd v V/O Exportchleb [1966] 1 QB 630
Greenhalgh v Mallard [1947] 2 All ER 255
Henderson v Henderson (1843) 3 Hare 100
Hilton, ex p March, Re (1892) 67 LT 594
Houston v Sligo (Marquis) (1885) 29 Ch D 448
Hoystead v Taxation Commissioner [1926] AC 155
Hoysted v Federal Commissioner of Taxation 27 CLR 400
Huffer v Allen (1867) LR 2 Ex 15
Humphries v Humphries [1910] 2 KB 531
Kok Kan Sang v Siti Zaliha bte Mohd Noor & Anor [1993] 1 AMR 74
Land v Land [1949] 2 All ER 218
Lazarus-Barlow v Regent Estates Co Ltd [1949] 2 All ER 118
Leggott v Great Northern Rly Co [1876] 1 QB 599
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294
Mackenzie-Kennedy v Air Council [1927] 2 KB 517

Matthew v Osborne (1853) 13 CB 919
Mcharg v Woods Radio Pty Ltd (1948) VLR 496
Metropolitan Bank v Pooley (1885) 10 App Cas 221
Ong Lean Sim & Anor v Tio Kah Hin & Ors [1985] 1 MLJ 270
R v Inhabitants of the Township of Harlington Middle Quarter (1855) 4 E & B 780
Riches v DPP [1973] 2 All ER 935; [1973] 1 WLR 1019
Sanders (orse Saunders) v Sanders (orse Saunders) [1952] 2 All ER 767
Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd [1987] 1 MLJ 413
Suppuletchimi a/p Karpaya v Palmco Bina Sdn Bhd [1994] 2 MLJ 368
Thoday v Thoday [1964] 1 All ER 341
Tucker v Collinson 34 WR 354
Turley v Daw (1906) 94 LT 216
Willis v Beauchamp (Earl) (1886) 11 PD 59
Wulff v Jay (1872) LR 7 QB 756
Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581

Legislation referred to

Bankruptcy Act 1967 s 38(1)
Rules of the High Court 1980 O 18 r 19

Teja Singh Penesar (*Teja Singh Penesar & Co*) for the plaintiffs.
Asbir Kaur Sangha (*Asbir, Hira Singh & Co*) for the defendant.

Vincent Ng J: By virtue of a sale and purchase agreement dated 8 April 1985, the first plaintiff purchased flat unit No 161/1-1 ('the flat unit'), Anson Apartment, Pulau Pinang from a developer, namely Continental Trading Corp (M) Sdn Bhd ('the developer') through a financing loan of RM146,500 from the defendant bank ('the defendant').

The flat unit formed part of a block of apartments put up by the developer under a joint-venture agreement dated 23 March 1981 on a piece of land known as lot No 002125, section 12, Daerah Timur Laut, Penang ('the land') with the landowners, the Evangelical Lutheran Church in Malaysia and Singapore. The land was charged in favour of the defendants vide two charges for a bridging loan of RM2.3m made to the developer. The development of the block of apartments was completed on or about early 1987.

On 26 January 1988, upon default of the first plaintiff in instalment payment, the defendants issued a demand notice and commenced two legal actions to recover the sum of RM186,072.40, against the first plaintiff under Penang High Court Civil Suit No 22–499–89, and against the second and third plaintiffs, who are guarantors of the financing loan, under Penang High Court Civil Suit No 23–238–88. Upon obtaining judgment, the defendant then proceeded to file the following recovery proceedings:

(i) Penang High Court Winding-up Petition No 28–38–88 against the first plaintiff. A default winding-up order was made on 17 January 1994 but subsequently set aside on 1 September 1994. The defendants' appeal to the Court of Appeal against the setting aside order dated 17 January 1994 was dismissed on 5 June 1995. Against this decision of the Court of Appeal, the defendants have on 11 September 1995 obtained leave to appeal and have filed a notice of appeal on 22 September 1995 to the Federal Court.

(ii) Penang High Court Bankruptcy Petition No 29–1146–91 against the second plaintiff as a guarantor.

(iii) Penang High Court Bankruptcy Petition No 29–1145–91 against the third plaintiff as the other guarantor.

(iv) Penang High Court Originating Summons No 31–448–88 for an order of sale of the flat unit for recovery of RM177,952.69 due as at 24 May 1988.

Pursuant to this order for sale, the following six auction attempts were made:

Auction Date	*Reserve Price*	*Outcome*
17 May 1989	RM200,000	Taken off
14 August 1991	RM300,000	No Bidder
8 January 1992	RM278,000	No Bidder
20 May 1992	RM250,200	No Bidder
30 September 1992	RM230,000	No Bidder
21 April 1993	RM207,000	No Bidder

The plaintiffs have alleged that despite the fact that the above auctions were abortive, the defendant had by their failure to respond and negligent misrepresentations to prospective purchasers secured by the plaintiffs, precluded the first plaintiff from disposing of the flat unit by private sale to repay the loan. And that the defendant had never at any stage when the property was subject to auction replied categorically as to how much was still due to them in respect of the flat unit despite several attempts by the first plaintiff to sell the flat unit by private sale.

Consequently, on 15 September 1993, the first plaintiff together with the second and third plaintiffs, filed the current suit against the defendant company, whereunder the defendant has filed three applications — two for striking out and one for security for costs — viz encls 13, 37 and 22 respectively, all of which this court had dismissed with costs to the plaintiffs. Considering that the defendant has now appealed against my decision on encls 13 and 37, and in order to be well appraised of the real issues, it may be necessary here to set out, in so far as relevant, certain averments in the plaintiffs' statement of claim dated 15 September 1993:

8 On or about 8 February 1990 the first plaintiff entered into a sale/purchase agreement with one Chiang Tao-Fan for the sale of said unit at a price of RM220,000 with a view to settle monies due to the defendant. This was intimated to and was in the contemplation of

the defendant. The loan amount on or about this date was approximately RM210,000.

9 The purchaser's solicitors Messrs Chew, Tan & Lim in furtherance of the said sale/purchase agreement wrote to the defendant inquiring about redemption of the said unit.

10 In an answer to the said inquiry made by the said intending purchaser's solicitors the defendant represented that the said property had not been redeemed by the first plaintiff from its two existing charges.

Particulars:

(i) the said inquiry was made by Messrs Chew, Tan & Lim, Advocates and Solicitors vide their letter dated 5 June 1990; and

(ii) the defendant's said representation were made vide their letter dated 8 June 1990.

11 At the time of making the said representations the defendant intended and knew or ought to have known that the said representations would be passed to the said purchaser by Messrs Chew, Tan & Lim and that the said purchaser would rely thereon in respect of his said purchase agreement of the said unit.

12 In the premises thereof the defendant was under a duty to take care in making the said representations.

13 Acting on and in reliance of the said representations the said purchaser rescinded the said sale/purchase agreement dated 8 February 1990.

14 In breach of the said duty, the defendant was guilty in making the said representations:

Particulars:

(i) failing to ascertain whether the said unit was indeed the subject matter of the said two charges; and

(ii) wrongly and negligently making the said representation without verifying the same.

15 In truth and in fact the said representation was false and untrue.

16 Subsequently, on or about 2 June 1992 one Tan Eng Nam agreed to purchase the said unit at a total consideration of RM278,000 and in furtherance thereof paid a deposit of RM27,800. The loan amount at or about this time was about RM250,000.

17 In consequence thereof, the first plaintiff wrote to the defendant with a view to obtain the defendant's consent to dispose of the property and settle the said loan. In good faith, the first plaintiff remitted the entire deposit of RM27,800 to the defendant as an advance payment.

18 The defendant wrongfully and without reason withheld such consent thereby causing the sale to be aborted and in consequence thereof the first plaintiff was not able to dispose of the said property to settle the said fixed loan.

19 The defendant commenced the following proceedings to enforce recovery loan and interest due:

A (i) Penang High Court Winding Up Petition No 28–38–91 against the first plaintiff;

(ii) Penang High Court Bankruptcy Petition No 29–1146–91 against the second plaintiff;

(iii) Penang High Court Originating Summons No 31–448–88 for
B an order for sale of the said property; and

(iv) Penang High Court Bankruptcy Notice No 29–1145–91 against the third plaintiff.

20 In consequence of the order for sale made in Originating Summons No 31–448–88, the defendant has put up the said unit for auction on
C the 17 May 1989 at the reserve price of RM200,000. The auction was taken off and on 14 August 1988 the unit was put for auction at the reserve price of RM300,000. The auction was aborted as there were no bidders and the reserve price was reduced to RM278,000 then to RM250,000 and finally to RM207,000 on 21 April 1993. All
D attempts were aborted.

21 The plaintiffs will contend that the defendant intentionally and maliciously filed multiple proceedings to recover the same debt and has in consequence obtained cost in all matters when at all material times the first plaintiff was ready, willing and able to repay the loan.

E 22 Due to the defendant's above breaches and defaults in not accepting settlement as proposed, the first, second and third plaintiffs have suffered loss and damages.

23 Whereof the first, second and third plaintiffs claim against the defendant for damages, interest, cost and any other relief that this honourable court might deem just and reasonable.

F On 18 October 1993, the defendant filed a summons-in-chambers (encl 8) for an order that the writ of summons and the statement of claim by:

(a) the third plaintiff be set aside; and

(b) the first and second plaintiffs be stayed.

G On 18 May 1994, prayer (a) of encl 8 was granted and prayer (b) was withdrawn with no order as to costs.

On 13 May 1994, the defendant applied (in encl 22) for an order that the plaintiffs provide security for the defendant's costs, over and above the RM7,000 security for costs that the second and third plaintiffs had already
H provided to secure the Official Assignee's consent to enable them to pursue their claim. And, they also made two other applications dated 24 February 1994 (encl 13) and 15 December 1994 (encl 37) to strike out the above proceedings.

In encl 12, affirmed by Ang Cheng Kok on 23 February 1994, the
I grounds in support of encl 13 to strike out the plaintiffs' action, are as follows:

(a) The first plaintiff had been wound up on 17 January 1994 vide Winding-Up Petition No 28–38–91.

(b) The second plaintiff had been declared a bankrupt on 17 October 1993 under Bankruptcy No 29–1146–91 and did not furnish the consent of the Official Assignee.

At the hearing of encl 13, the defendant's counsel, Mdm Asbir Kaur Sangha, conceded that as the winding-up order against the first plaintiff was set aside on 1 September 1994, the defendant was no longer pursuing encl 13 against the first plaintiff. However, as against the second plaintiff, counsel contended that though the second plaintiff was made a bankrupt on 17 October 1993 — two days after the service of summons on the defendant — she (second plaintiff) obtained the sanction of the assistant official assignee ('the AOA') only on 22 April 1994. As such, she 'should have stayed the action' and then applied for the sanction, since, under s 38(1) of the Bankruptcy Act 1967 ('the Act') she cannot maintain or keep alive an action without the previous sanction of the AOA. In my considered opinion, this contention should not be accepted by the court. In view of the fact that the second plaintiff was made bankrupt only after the service of the summons on the defendant, there is no necessity for her to withdraw the action, but only to obtain the sanction of the Official Assignee, which she subsequently secured on 22 April 1994. However, had the second plaintiff taken any further step or action in the proceedings against the defendant pending the said sanction (which was not the case here) such step could be nullified. To contend, as counsel did, that the word 'maintain' in s 38(1) of the Act should be read to mean that a bankrupt cannot keep alive any action without the previous sanction of the Official Assignee, would not make sense as it would work injustice on the bankrupt to require him or her to withdraw same and file afresh upon obtaining sanction.

The second point raised was that paras 2.2 and 2.3 of the letter of sanction from the Official Assignee dated 21 April 1994 required the second plaintiff firstly to deposit a sum of RM7,000 with the Official Assignee as security for costs and secondly to undertake to bear all costs that may be incurred in future as a result of the above civil suit, whereas the second plaintiff had only provided the security bond of RM7,000 but had not provided the undertaking in respect of the costs of the proceedings. Thus, it was submitted that there was non-compliance with the terms of the sanction. I disagree, as it is the Official Assignee who is clothed with the sole prerogative to determine whether his conditions have been complied. And, the short reply to this contention is contained in the letter dated 16 May 1994 from the Official Assignee which confirmed that the second plaintiff had fully complied with the terms contained in the Official Assignee's letter dated 21 April 1994, in the following words:

> Adalah saya merujuk kepada perkara tersebut di atas dan surat saya PPH(PP) 448/93/NA bertarikh 22 April 1994 surat tuan bertarikh 6 Mei 1994 dan memaklumkan bahawa syarat-syarat yang terkandung dalam surat saya tersebut telah pun dipatuhi oleh pihak tuan dan anak sibankrap Chuah Woei Woei No K/P A0880631, bagi pihak sibankrap, ...

In the event, I found the defendant's application in encl 13 devoid of any merit and dismissed it with costs to the plaintiffs.

Enclosure 37 was an O 18 r 19 application. At the onset of hearing of this enclosure, the defendant acknowledged that there was a time delay of 1 year 2 months in filing encl 37, an issue raised by the plaintiffs. However, I ruled that this was not fatal to their proceeding with encl 37 as they are not precluded from making such application so long as the matter has not been set down for trial. (See *Tucker v Collinson* 34 WR 354 and *Ong Lean Sim & Anor v Tio Kah Hin & Ors* [1985] 1 MLJ 270.)

Then, counsel for the paintiffs submitted with uncommon passion that the defendant, by filing multiple actions with consequential judgments and orders, taxation for costs resulting in winding-up action against the first plaintiff and receiving and adjudication orders against the second and third plaintiffs, with various appeals therefrom, had built up huge costs. The redemption sum had also increased from RM186,072.42 to the region of about RM300,000 presently. Added to this, is the exorbitant costs already taxed. This, according to counsel, has caused grave injustice to the plaintiffs; as the undisputed facts have disclosed that the plaintiffs had from the outset been prepared to repay the defendant by taking concrete steps to sell the flat unit by private treaty, which the defendant had by their unreasonable conduct, precluded the plaintiffs from accomplishing. And now, since the filing of this action, the defendant has also made several attempts to stall or strike out the action by filing encls 8, 13, 22 and 37.

Although, Mr Teja Singh's above submission does not appear to be wholly without foundation, and it is for this reason that I have here belaboured over the unfortunate historical and procedural development of this case, yet nevertheless, it is this court's duty to dispassionately and carefully determine whether the plaintiffs had discharged the onus placed on them to show the court that they have a prima facie cause of action against the defendant in which they have a reasonable (or some) prospect of success. And, should they fail to do so the court may strike out this action — its sympathy notwithstanding.

For the purpose of clarity, when considering encl 37, I shall first state the two issues involved, then the law relating thereto followed by my decision on each of the issues respectively by applying the law pertaining to the facts herein.

The issues raised by the defendant in its grounds for the striking out of the writ and the indorsement of claim are two-fold:

(i) the statement of claim does not disclose a reasonable cause of action and it is frivolous, vexatious and an abuse of the court; and

(ii) the second plaintiff is caught by the estoppel and res judicata principles — as pleaded in para 10 of the defence.

On the first issue — the law

In considering the first issue, I am mindful of the trite law that a plaintiff is not to be 'driven from the judgment seat' (per Fletcher Moulten LJ in *Dyson v A-G* [1911] 1 KB 410 at p 419) and, that an order to strike out will only be made in cases where it is obvious that the claim is devoid of all merit or cannot possibly succeed. (See *Willis v Beauchamp (Earl)*

(1886) 11 PD 59.) Also, in such an application the onus is placed on the plaintiffs to show that they have a reasonable cause of action with prospect of success. (See *Mcharg v Woods Radio Pty Ltd* (1948) VLR 496; *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413.) On the other hand, a dismissal of proceedings may 'often be required by the very essence of justice to be done' (see *Metropolitan Bank v Pooley* (1885) 10 App Cas 221), so as to prevent parties being harassed and put to expense by frivolous, vexatious or hopeless litigation (see *Riches v DPP* [1973] 2 All ER 935 at p 942; [1973] 1 WLR 1019 at p 1027).

The application

The essence of the plaintiffs' claim, gleaned from paras 8–18 of the statement of claim, is that the first plaintiff has secured purchasers and had even entered into a sale and purchase agreement to sell the property for RM220,000, which at that time they had thought to be higher than the loan amount due. But they had failed in their attempt to settle due to the refusal or unwillingness of the defendant to respond categorically to several requests from the plaintiffs and prospective purchasers for information on the outstanding amount then due on the loan.

The defendant themselves had exhibited in their supporting affidavit (encl 36), an affidavit affirmed by the second plaintiff on 6 August 1990, in Civil Suit No 22–499–89 wherein the second plaintiff (the manageress of the sole defendant company in that suit) had stated as follows:

> 6 The defendant had made an arrangement to repay to the plaintiff (the defendants here) by way of selling off the said flat as stated in para 5 thereof to a prospective purchaser for a total amount of RM220,000. The proceeds of sale was at all material times intended to repay the plaintiff's claim.
>
> 7 Following the signing of the sale and purchase dated 8 February 1990, the defendant wrote to the plaintiff and asked for an up to date redemption statement so that the plaintiff's claim can be paid off and the said flat held for security can be released for transfer to a new purchaser. The purchaser also applied for a housing loan from Hong Kong & Shanghai Banking Corp and the said loan was duly approved.
>
> 8 Despite the effort to repay the plaintiff, the plaintiff has unreasonably refused to allow the said flat to be sold and by letter dated 8 June 1990 from the plaintiff to the solicitor for Hong Kong & Shanghai Banking Corp stating there are two charges on the said property purported to have been charged by the landowner in favour of the plaintiff, which have not been discharged.

In response to a query from the court, counsel for the defendant Mdm Asbir, conceded that she could not show to the court any letter from the bank to indicate that the defendant had, at the material time, informed the plaintiffs or the prospective purchasers of the flat unit the latest outstanding figure then due from the plaintiffs, but there were only letters written by the defendant to reject the offer when the offer was below the actual amount owing to the defendant. She also conceded that so long as the first plaintiff finds a buyer whereby the whole amount due to the bank could be settled, then it would be imprudent for the defendant not to accept. It is also clear from the submissions and the affidavits of the defendant that the

A only information received by the first plaintiff was contained in a letter dated 8 July 1990 (exh 'TLH3' of encl 36) wherein the defendant in response to the first plaintiff's enquiries had advised that 'the said unit of apartment has not been redeemed by the said proprietor from its two existing charges'. Be it noted that the two charges were for the bridging loan of RM2.3m for the entire block of apartments under which the total B redemption sum was then RM1.3m. Counsel for the defendant had further contended that by the first plaintiff's own admission, the sum owing when they made the offer on 17 April 1992 was RM290,000 whereas the offer by the purchaser was RM278,000, and as such the defendant was justified in refusing to allow the redemption of the property. But even so, it is of C crucial importance for the court to consider whether the conduct of the defendant is justified, in keeping the first plaintiff and potential purchasers on a perpetual guessing game to determine the actual amount due to the defendant at the material time, such information was apparently treated as privy only to the defendant and the lot was on the plaintiffs to guess the number of beans in the bottle, so to say. Unfortunately here, to guess D wrongly would not entail the loss of, say, a television set or rice-cooker prize, but grievous loss of a flat unit residence and enormous taxed costs on the various actions at various levels, to boot — truly, an appalling state of affairs which this court could hardly condone.

It is settled law that when an order for sale is made, the chargor does E not abrogate all his rights to the chargee, until a bid is accepted, the chargor still retains the right to tender payment of the amount due to the chargee and to call off the sale. (See *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294.) Indeed, as nearly as 1872, this principle was already well settled in England — in the case of *Wulff v Jay* (1872) LR 7 QB 756 and articulated by Cockburn CJ (at pp 762–763) F thus:

> Cases have been cited and authorities have been referred to in *Story's Equity Jurisprudence*, which abundantly establish that which is a common and well-known proposition, that where a debt is secured by a surety, it is the business of the creditor, where he has security available for the payment and G satisfaction of the debt, to do whatever is necessary to make that security properly available. He is bound, if the surety voluntarily proposes to pay the debt, to make over to the surety what securities he holds in respect of that debt, so that, being satisfied himself, he shall enable the surety to realize the securities and recoup himself the amount of the debt which he has had to pay. That is now a well-known proposition. ... it is clear that they have H placed the surety in a position very detrimental and prejudicial to the surety; and for that the surety ought to have, according to the general doctrine, a remedy.

As such I hold that the plaintiffs' statement of claim discloses a prima facie and reasonable cause of action against the defendants and it would not I justify the striking out their claim at this stage summarily.

On the second issue — the law

Every estoppel must be specifically pleaded, not only because it is a material fact but also because it raises matters which might take the opposite party by surprise, and usually raise issues of fact not arising out

of the preceding pleading. It is not, however, necessary to plead estoppel in any special form so long as the matter constituting the estoppel is stated in such a manner as to show that the party pleading relies upon it as a defence or answer (see *Houston v Sligo (Marquis)* (1885) 29 Ch D 448; *Sanders (orse Saunders) v Sanders (orse Saunders)* [1952] 2 All ER 767, per Lord Merriman P at 769). On the other hand, where a party omits to plead the defence of estoppel, when he has the opportunity of doing so, he cannot thereafter rely on it (see *Matthew v Osborne* (1853) 13 CB 919).

It is appropriate to note that there is a distinction between cause of action estoppel and issue estoppel. Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case, the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment.

Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negativing the existence of a cause of action. (See *Henderson v Henderson* (1843) 3 Hare 100 at pp 113–114, *Hoystead v Taxation Commissioner* [1926] AC 155 at p 170 and *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 at p 590.)

Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue. (See *Duchess of Kingston*'s Case (1976) 20 St Tr 355; *R v Inhabitants of the Township of Harlington Middle Quarter* (1855) 4 E & B 780.) The name 'issue estoppel' was first attributed to it by Higgins J in the High Court of Australia in *Hoysted v Federal Commissioner of Taxation* 27 CLR 400. It was adopted by Diplock LJ in *Thoday v Thoday* [1964] 1 All ER 341 — having described cause of action estoppel as one form of estoppel per rem judicatam.

Issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier proceedings. (See *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 at p 642.) Issue estoppel can arise even where a plea of res judicata cannot be established because the causes of action are not the same.

A party cannot in a subsequent proceeding raise a ground of claim or defence which upon the pleadings or the form of the issue was open to him in the former one (see *Henderson v Henderson* (1843) 3 Hare 100 at p 115; *Greenhalgh v Mallard* [1947] 2 All ER 255 (CA); *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor*), and a defendant to a second action by the same plaintiff is estopped from putting on record a plea which is inconsistent with any traversable allegation in the statement of claim in the former action, but it would seem that he is not estopped from setting up

in the second action a plea which confesses and avoids, or matters which are raisable by special plea necessitating proof on the part of the defendants (see *Humphries v Humphries* [1910] 2 KB 531 at p 535, *Hoystead v Taxation Commissioner* [1926] AC 155 at p 170). The court has inherent jurisdiction to strike out as frivolous and vexatious a claim or defence which has either been already decided in previous proceedings against the party raising it or might have been raised in a previous proceeding in which the facts necessary to raise it have been decided against the party desiring to raise them (see *Mackenzie-Kennedy v Air Council* [1927] 2 KB 517 at p 528 (CA); *Leggott v Great Northern Rly Co* [1876] 1 QB 599). (Also see 16 *Halsbury's Laws of England* (4th Ed).)

In *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1967] 1 AC 853, the following requirements of issue estoppel were laid down: (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final; and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognize that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the *Carl-Zeiss* case [1967] 1 AC 853 at p 947.

To create an estoppel by record, the finding must be part of the ratio decidendi (see *Sanders (orse Saunders) v Sanders (orse Saunders)* [1952] 2 All ER 767). Equally an estoppel per rem judicata can only be based on the issues actually decided in the former proceedings and not on what are called 'collateral issues' (see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3)* [1970] 1 Ch 506) and it should be specifically pleaded but it may be pleaded by way of estoppel to an entire cause of action rather than to a single matter in issue. (See 16 *Halsbury's Laws of England* (4th Ed) para 1527.)

To raise res judicata a defendant has to produce the pleadings and record of proceedings and judgment. The party replying on res judicata giving rise to an estoppel should be able to show that the matter had been determined by a judgment in its nature final (see *Turley v Daw* (1906) 94 LT 216; *Bynoe v Bank of England* [1902] 1 KB 467; *Land v Land* [1949] 2 All ER 218). The word 'final' is used here as opposed to 'interlocutory' (see *Allnutt v Mills* (1925) 42 TLR 68) and the record of the court's act on which the estoppel by res judicata is founded must be forthcoming, or some valid reason given why it cannot be produced (see *The 'Annie Johnson'* (1921) 91 LJP 64). Closer home, this aspect of the law was discussed in *Kok Kan Sang v Siti Zaliha bte Mohd Noor & Anor* [1993] 1 AMR 74 at p 77 where Lim Beng Choon J had this to say:

> In any event counsel did not produce the judgment of the Supreme Court, neither did he produce the record of the proceeding. Failure to do so is fatal to his reliance on the res judicata principle (see *The 'Annie Johnson'* 91 LJP 64) since there is nothing to indicate that the issues in dispute in the present case had indeed been considered and determined by the Supreme Court.

It has been held that so long as a statement stands, and the record of the act of the court is forthcoming (see *The 'Annie Johnson'*), no one who was a party thereto can reopen that litigation (see *Huffer v Allen* (1867) LR 2 Ex 15). And, in order that a defence of res judicata may succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity of recovering (see *Re Hilton, ex p March* (1892) 67 LT 594), or but for his own fault might have recovered in the first action, eg through counterclaim, what he seeks to recover in the second (see *Re A Debtor (No 472 of 1950)* [1958] 1 All ER 581).

The application

In para 10 of the defence, the defendants had averred as follows:

> The second plaintiff had raised the allegation made in paras 8–15 of the statement of claim in Penang High Court Civil Suit No 22(23)–238–88 on the application to strike out the defence of the second plaintiff and Tan Yew Nam and to enter summary judgment against them by the defendant but judgment was entered against her on 23 May 1991 and she never appealed against the said judgment. Hence, the first and second plaintiffs are estopped from raising this issue herein as issue estoppel and res judicata applies.

Learned counsel for the defendant strongly relied on the case of *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581. The case of *Yat Tung Investment Co Ltd* is clearly distinguishable from the facts of the current case. In that case, the Privy Council upheld the decision of the full court of the Supreme Court of Hong Kong, which in turn confirmed the decision of the High Court, ordering that the statement of claim filed subsequently by the appellant/borrower against the respondent/lender bank, be struck out, upon the application of the doctrine of res judicata in its wider sense, and also as it would be an abuse of the process of the court to raise in subsequent proceedings, matters which clearly could have and should have been litigated in the earlier proceedings. The Hong Kong High Court had found that the bank's counterclaim in the earlier suit had squarely put before the court the correctness of the bank's manner of accounting for the sum which it said was owed to it by the borrower. And, it held that as no compelling reason had been advanced to show why the borrower's complaint of the bank's erroneous manner of accounting (besides the complaint concerning the bogus nature of the mortgage between the bank and the second respondent) could not have been pleaded by way of a defence to counterclaim in the earlier suit, the borrower's subsequent suit ought to be struck out.

The ratio in *Yat Tung Investment Co Ltd* enlarging the application of the doctrine of res judicata may be applied only with caution. It is pertinent to note that, as the issue (concerning accounts) raised by the borrower in his subsequent action was pointedly and directly related to the issue squarely put before the court in the lender/bank's earlier counterclaim, the judge in the Hong Kong High Court would appear to have been driven to ground his decision upon a wider application of the principle of res judicata. Thus, this decision was confirmed by the Privy Council largely upon facts peculiar to that case. The court must not lose sight of the requirement, in the interest of justice, that the various estoppel principles

discussed above have to be viewed through the looking-glass cardinal principle that no party should be readily driven from the judgment seat, though the onus is on he who sues to show the court that he has a prima facie cause of action, upon the test that I have applied in *Supputletchimi a/p Karpaya v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368. In the current case, the plaintiffs have successfully discharged the onus upon the optimum evaluation test.

It is to be noted that the subject matter of Suit No 22(23)–238–88 was monies due from the second and third plaintiffs under a loan agreement, and the first plaintiff was not a party thereto (see *Lazarus-Barlow v Regent Estates Co Ltd* [1949] 2 All ER 118 at p 122). Whereas the plaintiffs' claim herein arises, inter alia, out of 'misrepresentation' made by the defendant upon the plaintiffs proposed sale. Also, to be noted for completeness is that in Suit No 22-499-89, only the first plaintiff was cited as a party. As the defendant has filed multiple actions it cannot be heard to blame anyone should it now find itself in the situation to reap the bad harvest. It is thus essential here to be mindful that as the first plaintiff was not a party to Suit No 22(23)-238-88, they had no opportunity to resist or counterclaim against the defendant (plaintiff therein) in that suit and hence should not be precluded from recovering in the current suit.

The cause of the action of the matters in Suit No 22(23)-238-88 and that in the present suit being different there is no 'cause estoppel'. The issues being different there is no 'issue estoppel' and finally, though issue estoppel and res judicata were pleaded in the defence against the second and third plaintiffs, the question of tortious misrepresentation was not even remotely raised, pleaded in issue or decided in proceeding No 22(23)–238–88 (being an action to enforce a guarantee), and neither did the defendant produce before this court, any court records thereof. Thus, res judicata giving rise to an estoppel does not arise.

Furthermore, even if the various plea of estoppel and/or res judicata could validly be raised (which I have held otherwise), in the present circumstances, as it is now trite law that justice required the non-application of the estoppel or res judicata principles on a party who suffered from the alleged conduct of the other, the plaintiffs should not be prevented or shut out from re-opening the issue when it arose in later proceedings. Be it noted that, both in *Carl Zeiss* case as well as in *Yat Tung Investment Co Ltd*, the courts have expressed its reluctance for too wide an application of the various estoppel and res judicata principles and made clear that 'nevertheless, "special circumstances" are reserved in case justice should be found to require the non-application of the rule.'

For all the above reasons, I held that the plaintiffs have a reasonable cause of action against the defendant and they are not in any way caught by any of various estoppel or res judicata principles and I decided to dismiss encl 37 with costs to the plaintiffs.

Applications dismissed.

Reported by Sally Kee Seok Meng